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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARLOS AGUILAR, Defendant and Appellant.	G049295 (Super. Ct. No. 11ZF0117) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric Swenson and Barry Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Juan Carlos Aguilar of second degree murder for killing his girlfriend's 18-month-old niece, Megan R. (count 1, Pen. Code, § 187; all further statutory references are to this code), assault by a caretaker on a child under eight years old, causing death (count 2, § 273ab), and child abuse by a caretaker likely to cause great bodily injury or death (count 3, § 273a, subd. (a).) The last count pertained to an incident in which defendant fractured his nine-week-old daughter's ribs in more than a dozen places, before he killed Megan almost two years later. Defendant contends the trial court erred in failing sua sponte to instruct the jury on involuntary manslaughter as a lesser included offense of murder because he was unaware assaulting Megan was dangerous. He also claims his sentence of 25 years to life for killing Megan amounts to cruel and unusual punishment. These claims have no merit, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 2009 defendant lived with his girlfriend S.C. and became frustrated when their newborn daughter L. cried. Defendant had a history of shoving S. in tempermental fits, but S. never called the police because he would tearfully beg her forgiveness and promise not to hit her again.

When L. was just over two months old, S. took her to the hospital because she was crying a lot and heard L. make a cracking sound when she breathed, after S. had left L. alone with defendant. X-rays showed L. suffered almost 20 rib fractures, some of which were acute and recently inflicted and others were older and in the process of healing. Most of the fractures were posterior, a location highly specific for child abuse. A doctor explained at trial that because a young child's ribs are so pliable, it takes great force to fracture them.

In an initial interview with a police investigator, defendant attributed L.'s fractures to a "difficult" childbirth, or alternately suggested she injured herself when he tried to cradle her or when she fell off a bed while he was watching her. At the police

station, he admitted he "could have" picked her up forcefully under the arms, but he had been so frustrated that he did not remember clearly.

The police arrested defendant, but as the People acknowledge, "[f]or reasons not apparent in the record," defendant was not prosecuted at that time, and instead was deported. S. lost custody of L. for a year, and was warned to keep defendant away from her until he completed parenting classes. According to S., defendant did not attend counseling or complete any reunification measures.

In January 2011, defendant moved back in with S., who now shared an apartment in Santa Ana with her sister Karen and Karen's daughter, Megan, who was one and a half years old. Defendant told S. he had changed. But he resented it when Karen left Megan in S.'s care. Megan cried around defendant, which also bothered him. Megan seemed to fear defendant, and soon after he moved in, she was hospitalized with a laceration to her pancreas caused by blunt force trauma.

On July 9, 2011, Megan's usual babysitter was unavailable and Karen had to leave the apartment at 5:00 a.m. to catch a bus to work, so she left Megan with S. Defendant was also home, and he got up when Megan began crying. S. soon looked in on Megan, who had gone back to sleep, and then S. left the apartment with L. to buy groceries. She was gone less than an hour, returned to cook breakfast, and within 20 to 30 minutes, checked on Megan and found her unresponsive, with bluish skin.

S. shouted at defendant, demanding to know what happened; he pled ignorance, but refused her instructions to call 911 and prevented her from calling because the authorities would discover he had been living there. He gathered up so much of his clothing that a maintenance worker who saw the couple departing the apartment thought they were moving out. S. carried Megan to their vehicle, and defendant drove to Karen's workplace at a Newport Beach hotel, where defendant exited the car and found Karen. Megan was still unresponsive. Defendant drove back to a hospital in Santa Ana, where he dropped off S., Karen, and Megan, and immediately departed, keeping L. with him.

The emergency room doctors found Megan comatose and in critical condition, with unstable vital signs. She suffered cardiovascular collapse within minutes of her arrival, and the treating physician remembered vividly that Megan seemed to take a last gaze to her right, and then her pulse stopped. Hour-long C.P.R. efforts to revive her failed.

Megan's body was covered head to toe with bruises. The emergency room doctor noted her belly was distended "almost like a basketball" from internal hemorrhaging, which an ultrasound suggested was due to organ ruptures. The autopsy physician drained 200 cubic centimeters of blood from her abdominal cavity, nearly a quarter of her blood supply. The autopsy confirmed the blood came from lacerations to Megan's liver and the mesentery tissue and blood vessels connecting her intestines to her posterior abdominal wall. She also suffered bleeding in her lower left lung.

X-rays revealed five rib fractures; three were less than 24 hours old, and two were a few weeks old. The fractures were all toward the back of Megan's thoracic cavity, highly specific for child abuse. Her lower back was dotted with multiple circular or ovoid contusions, which are often caused by fingertips and sometimes knuckles. She had ovoid contusions over her right lower chest and right upper abdominal region, a bruise on her left upper back, contusions on the back of her right hand, on her right fingers and left thumb, and in front of her hips, and the inside of her lip was torn. Karen had taken Megan to a doctor for a fever the day before she died, and the physician's assistant confirmed Megan had no bruises when she was examined that day, nor any unusual health history except for her pancreas injury months earlier.

The autopsy also disclosed a large, hours-old contusion on Megan's right forehead, with other contusions on her left forehead, left lip, and right eye. These multiple impact sites, together with circular and irregular areas of bleeding under her scalp indicated her head had been struck repeatedly with a hard object or had been slammed repeatedly against a hard surface. The autopsy listed Megan's cause of death as

multiple blunt force traumas, which a physician at trial explained were so severe that a victim ordinarily would succumb, as Megan did, within "a matter of minutes to hours as opposed to hours or days." The physician testified, "There's no question this child was abused."

After Megan died, a social worker at the hospital ordered S. to have L. brought in, and S. relayed the message to defendant, who avoided the hospital by giving L. to one of S.'s friends to drop off.

A detective arranged for S. to make a covert call to defendant that night, but he was suspicious, questioning whether the police knew she was talking to him and warning her to be careful "because they have microphones there." He told her she should have lied to avoid disclosing he lived at the home, and he warned her, "Don't say my name please and erase everything." He denied knowing anything about how Megan had been injured.

In an interview with police the day after Megan died, defendant would not refer to her by name, but only as "the girl." He admitted he had an "explosive personality" and a problem with sudden episodes of blinding anger that overcame him. He described an incident in which he struck S., but claimed it was inadvertent because he merely "hit myself on the wall and that was when I hit her." He explained his angry personality in the context of "demons motivat[ing] him to do bad things," and related how one time at church in prayer, he "tried to talk to God," "I told him, let's see, well, I don't want to be like that. I mean, well, with this personality that I have, well, to be grouchy like explosive or I don't know." He admitted anger management classes would be helpful, but according to S. he did not attend any classes after he injured L. He claimed in his police interview he simply had dropped L. in the shower and had been deported as a result.

Defendant admitted in the interview that while S. had been out shopping while Megan was in his care, he entered her room and tried to console or "control" her

"so that she wouldn't cry." He admitted he grabbed and squeezed her and may have used too much force, but he did not intend to hurt her, only to make her stop crying. He claimed her head injuries may have occurred because her crib was too close to the wall, so that she hit it when he grabbed her, or she could have knocked into the wall herself.

Defendant had once told S. he had a dream about hurting Megan when he was standing over her crib, and a voice told him to "do it." He denied in his police interview hearing any voices the day Megan died. He claimed the last time a voice in his head had told him to hurt Megan was days earlier.

The detective who interviewed defendant found him responsive and coherent, displaying no signs of intoxication or mental incapacitation or illness. Defendant did not testify, and the jury convicted him as noted at the outset. The trial court sentenced defendant to a term of 25 years to life on count 2 for child abuse by a caretaker resulting in death, stayed under section 654 a sentence of 15 years to life on the murder count, and imposed a consecutive six-year term on the child endangerment count for L.'s injuries. Defendant now appeals.

II

DISCUSSION

A. *Defendant Was Not Entitled to an Involuntary Murder Instruction*

Defendant contends the trial court erred in rejecting his request for a jury instruction on involuntary manslaughter as a lesser included offense of murder. The trial court must instruct on lesser included offenses, even in the absence of a request, when evidence the lesser offense may have been committed is "'substantial enough to merit consideration' by the jury. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).) The evidence meets this threshold when a "reasonable [jury] could conclude the particular facts underlying the instruction existed." (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.) The trial court has no duty to instruct on lesser included offenses that are not supported by substantial evidence. (*Breverman*, at p. 162.)

Involuntary manslaughter may be a lesser included offense when murder is charged. (*People v. Prettyman* (1996) 14 Cal.4th 248, 274.) A defendant commits involuntary manslaughter when he or she kills another human being without malice (1) in the commission of a criminal offense not amounting to a felony, or (2) in the commission of a lawful act which might produce death, either by (a) committing the ordinarily lawful act in an unlawful manner or (b) without due caution and circumspection. (§ 192, subd. (b).) Phrased more generally, involuntary manslaughter is an unlawful killing that lacks the element of malice necessary for murder and the element of intent to kill necessary for voluntary manslaughter. (*People v. Broussard* (1977) 76 Cal.App.3d 193, 197.)

More specifically, the difference between murder and involuntary manslaughter turns on the difference between implied malice and an unwitting disregard for life. The malice necessary to constitute murder may be express or implied. Express malice consists of a defendant's "deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) Implied malice is reflected in committing an act one knows will endanger others, with conscious disregard for life. (*People v. Lasko* (2000) 23 Cal.4th 101, 107.) In other words, implied malice murder is committed when the defendant subjectively appreciates the risk his actions pose to others, but proceeds anyway with a conscious disregard for life. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1007 (*Butler*).)

In contrast, a defendant commits involuntary manslaughter when a reasonable person objectively "would have been aware of the risk" inherent in the defendant's actions, but the defendant did not grasp the risk. (*Butler*, *supra*, 187 Cal.App.4th at p. 1008.) This culpable lack of awareness is sometimes described as criminal negligence. "'"[C]riminal negligence"' exists when the defendant engages in conduct that is '"aggravated, culpable, gross, or reckless"'; i.e., conduct that is '"such a departure from what would be the conduct of an ordinarily prudent or careful man under

the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.'"" (*Ibid.*) Thus, "if the defendant commits an act which endangers human life without realizing the risk involved, he is guilty of manslaughter, whereas if he realized the risk and acted in total disregard of the danger, he is guilty of murder based on implied malice." (*People v. Cleaves* (1991) 229 Cal.App.3d 367, 378.)

Defendant was not entitled to an involuntary manslaughter instruction because there was no evidence he did not appreciate that his brutal actions posed a risk to Megan's life. Defendant did not testify or tell the police, S., or anyone else that he did not recognize his actions endangered Megan's life. Understandably so, since the claim would be almost unfathomable, given Megan's grievous injuries. Defendant, however, suggests his failure to *affirmatively* recognize at any time the seriousness of Megan's injuries constitutes substantial circumstantial evidence supporting an involuntary manslaughter instruction on grounds that he did not realize the danger of his actions, whatever he may have done to Megan. Rather than flee the scene, defendant drove [Megan] and [S.] to find Megan's mother and then drove them to the hospital. While there can be little doubt that [he], at that point, realized Megan was injured, he showed no awareness of the serious nature of her injuries."

In the same vein, defendant argues there is "no clear evidence of exactly what actions he took" in harming Megan and that, "[t]aken in the light most favorable to the verdict, [his] actions caused Megan's death, but his subjective understanding or appreciation of the risks inherent in whatever actions he took remains in question."

Defendant's argument is unpersuasive because it obfuscates the nature of the force he applied to cause Megan's injuries. He inflicted such force on her body that she lost in internal hemorrhaging a quarter of her blood supply. He left a large contusion on the right side of her forehead, other contusions on her left forehead, left lip, and around her right eye; he tore the inside of her lip, caused hemorrhaging in her left lung,

and left bruises from his fingers or knuckles all over her body; he hit her head either directly or by slamming it on a hard surface multiple times in multiple places on her skull, causing subcutaneous bleeding; and he crushed her ribs directly or by impact with enough force to fracture them in multiple places. As the physician explained at trial, given the flexibility of a young child's rib bones, the force necessary to cause Megan's fractures was the equivalent of a car crash or a fall from a significant height. The Attorney General correctly observes that "[n]o one could apply such terrible force to a child and not have a subjective, conscious awareness that the child might die."

Notably, defendant does *not* claim there was any evidence he was unconscious or otherwise unaware of his actions in inflicting these injuries, nor does he claim the voices he mentioned in his police interview and to S. were evidence that he did not appreciate the risk posed by his actions because of a mental defect. He *does* suggest that the voices constituted "evidence [that] was substantial enough that it could have caused one or more jurors to have doubts as to whether [he] truly acted with a conscious disregard for human life." Nothing in the record suggests that whatever defendant may have heard in his head made him unaware of his actions. Cognizant of his actions, he thus was cognizant of the tremendous force he was inflicting on Megan, and no evidence suggested he could not or did not appreciate the risk such force posed when inflicted on a young child's body. The requirement to instruct the jury on lesser included offenses stems from the *existence* of evidence to support the instruction (*Breverman*, *supra*, 19 Cal.4th at p. 162), not from speculative explanations for the absence of evidence. Accordingly, the trial court did not err in failing to instruct the jury on involuntary manslaughter.

B. *Defendant's Sentence Is Not Unconstitutional*

Defendant contends his 25-years-to-life sentence on count 2 violates the federal and state constitutional prohibitions against cruel and unusual punishment. (U.S.

Const., 8th Amend.; Cal. Const., art. I, § 17; see *Harmelin v. Michigan* (1991) 501 U.S. 957, 997 (conc. opn. of Kennedy, J.) [Eighth Amendment "encompasses a narrow proportionality principle"]; *People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*) ["punishment may violate the [state] constitutional prohibition not only if it is inflicted by a cruel or unusual method, but also if it is grossly disproportionate to the offense for which it is imposed"].) Because "in our tripartite system of government it is the function of the legislative branch to define crimes and prescribe punishments" (*In re Lynch* (1972) 8 Cal.3d 410, 414 (*Lynch*)), a defendant bears a "considerable burden" to show the requisite disproportionality. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) Consequently, such findings "have occurred with exquisite rarity in the case law." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.)

Defendant raises both an as-applied challenge under *Dillon* asserting his individual culpability does not warrant a sentence of 25 years to life, and he also asserts a facial challenge to the statute providing for that sentence (§ 273ab) on grounds that it is per se excessive given the lack of premeditation and deliberation that underlies a 25-year life term for first degree murder. He analogizes his offense to second degree murder with its lesser penalty of 15 years to life for conscious disregard for life. Defendant's as-applied and facial challenges are both without merit.

As-applied constitutional challenges under *Dillon* are necessarily fact-specific, and defendant therefore forfeited his contention by failing to raise it in the trial court. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) To escape the forfeiture rule, defendant turns to "the universal solvent, the claim of ineffective assistance of counsel" (*People v. Provencio* (1989) 210 Cal.App.3d 290, 303), but it does not aid him. The claim requires representation below an objective standard of reasonableness that results in prejudice, i.e., a reasonable probability of a more favorable result absent counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma*

(1987) 43 Cal.3d 171, 216-218.) A reviewing court need not determine whether counsel's performance was deficient where the defendant cannot establish prejudice from the claimed error. (*People v. Lewis* (2001) 26 Cal.4th 334, 363-364.)

Here, there was not even a remote possibility of success had defendant's trial counsel raised an as-applied challenge. The challenge requires punishment "so disproportionate . . . that it shocks the conscience and offends fundamental notions of human dignity." (*Lynch, supra*, 8 Cal.3d at p. 424.) In *Dillon*, the court found mandatory first degree murder punishment under the felony-murder rule disproportionate where the jury, trial judge, and reviewing courts all expressed grave reservations about the individual culpability of an "unusually immature youth" who fired his weapon in fear while trespassing during a juvenile stunt. (*Dillon, supra*, 34 Cal.3d at p. 488.)

The facts in this case are not similarly mitigating by any standard. Defendant points solely to the happenstance that he "had no prior" when he was convicted of Megan's murder, but it was only because he was deported that he was not earlier prosecuted and convicted for inflicting severe injuries on his own infant daughter. He also suggests he acted "only" with a conscious disregard for life rather than express malice because the prosecutor did not argue he intended to kill Megan. But whether express or implied, the jury nevertheless found he acted with the requisite malice for murder (count 1, § 187), and that he did so as Megan's caretaker, causing her death (count 2, § 273ab). Nothing in a 25-years-to-life term shocks the conscience or offends fundamental notions of human dignity given the brutal fashion in which defendant extinguished the life of a helpless child, his niece, without any semblance of remorse.

Defendant's facial challenge similarly fails. That the sentence under section 273ab is the same as for first degree murder (25 years to life) does not pose a constitutional problem. The Legislature reasonably could conclude that those who violate a special duty of care and kill defenseless children under age eight entrusted to their protection present a grievous threat to society and their actions warrant severe

punishment. (See *In re Nunez* (2009) 173 Cal.App.4th 709, 728 [valid penological goals include retribution, incapacitation, and deterrence].) The Legislature is entitled to fashion, as here in section 273ab, harsh sentences based on moral disapprobation and the offender's dangerousness as reflected in whom he or she has victimized (§ 190, subd. (b) [25-years-to-life sentence for second degree murder of on-duty peace officer] and for particularly dangerous conduct or vulnerable victims (e.g., §§ 189; 667, subds. (b)-(i) [25 years to life for felony murder and for third-strike offenses with predicate serious or violent felonies]; see also *People v. Norman* (2003) 109 Cal.App.4th 221, 231 [noting life in prison without parole is not disproportionate for aggravated kidnapping].) Defendant's constitutional challenge has been roundly rejected by other courts (*People v. Lewis* (2004) 120 Cal.App.4th 837, 855-856; *Norman*, at pp. 230-232), and we do the same.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.